

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 2 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
 2. To be referred to the Reporter or not?
 3. Whether Their Lordships wish to see the fair copy of the judgement?
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
 5. Whether it is to be circulated to the Civil Judge?
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DILIP PURSHOTTAM KADIA

Versus

STATE OF GUJARAT

Appearance:

MR MJ BUDDHBHATTI for Petitioner
MR BD DESAI, PUBLIC PROSECUTOR for Respondent No. 1
NOTICE SERVED for Respondent No. 2 (Victim Bharti)

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE A.K.TRIVEDI

Date of decision: 30/07/98

ORAL JUDGEMENT

#. The appellant original accused in Sessions Case No.40/89 came to be convicted by the Assistant Sessions Judge, Jamnagar on 10-12-1992 for the offences punishable under Section 376 and 342 of the Indian Penal Code (IPC) and he has been sentenced to rigorous imprisonment for 10 years and also find of Rs.800/- in default 1 month imprisonment under Section 376 and simple imprisonment for 1 month and fine of Rs.200/-, in default 7 days imprisonment under Section 342. If the amount of fine is paid, the amount of Rs.700/- is ordered to be paid to victim minor Bharti by way of compensation and likewise

if the amount of fine of Rs.200 is paid, 50% of fine is ordered to be paid to Bharti by way of compensation. Both the sentences were ordered to run concurrently. Hence this appeal at the instance of original accused under Section 374 of Code of Criminal Procedure,1973 (Code).

#. The short spectrum of the facts may be stated at this stage, the prosecution case has been that the appellant who was aged 32 at the relevant time committed rape on one minor Bharti on 20.3.88 at about 4.15 P.M. in his own house. As she was called to fetch the water and when she entered into the house of the accused, the appellant who is, hereinafter, referred as, accused, he closed the door and committed repeated acts of rape on her. Minor Bharti, thereafter, goes back to her mother and narrates the story and complaint came to be recorded at about 11 P.M. with Jamnagar (City-Division Police). Thus, the investigation was started and upon the completion of the investigation, the accused came to be chargesheeted for offences punishable under Section 376 and 342 and accordingly he was sent to the trial before the Learned Assistant Sessions Judge and in Sessions Case No.40/89 charge came to be framed against the accused at Ex.2 for the offences punishable under Section 376 and 342 of IPC.

#. The prosecution placed reliance on 8 prosecution witnesses. The following 8 prosecution witnesses were relied upon.

Sr.No. Name & designation Ex.

1. Bhartiben Mansukhlal, complainant Ex.7
2. Dr.Hinaben Rasikbhai Patel Ex.9
3. Shardaben Mansukhlal, Mother Ex.13
4. Chhaganlal Laljibhai Ex.14
5. Rameshbhai Devabhai Ex.15
6. Dr.Satishbhai Dinkarbhai Kalele Ex.18
7. Nathesingh Pujesingh Rathod Ex.25
8. Ramansingh Ramsingh Rathod Ex.29

#. The prosecution also placed reliance on documentary evidence to which reference will be made by this court as and when required at a later stage. The learned Sessions Judge upon the examination and the appraisal of the testimonial and documentary evidence found accused guilty for the offences punishable under Section 376 and 342 on 10th December,1992. Pursuant to the statutory mandate, the appellant original accused Dilip was heard on the quantum of punishment. After

hearing the accused and his advocate and the Additional Public Prosecutor, the trial court imposed the sentence of 10 years and a fine of Rs.800/- and in default to undergo further imprisonment for 1 month and in case of recovery of fine to pay a fine of Rs.700/- to the victim minor Bharti for the offences punishable under Section 376. The accused is also sentenced to one month simple imprisonment and to pay fine of Rs.200/- and in default, to undergo 7 days imprisonment and to pay an amount of Rs.100/- by way of compensation to the victim minor Bharti for the offences under Section 342, which is directly and precisely under challenge before us in this appeal. We have dispassionately heard the learned advocate Mr.Bhuddhabhatti for the appellant original accused and also the Additional Public Prosecutor Mr.B D Desai and after considering the testimony and documentary evidence carefully, we find from the record that the impugned judgment of conviction and resultant sentences for the offences punishable under Section 376 & 342 are quite justified requiring no interference for the reasons we hasten to articulate hereinafter.

#. The prosecution witness No.1 victim of sexual offences minor Bharti Mansukhalal aged 13 years is examined, at Ex.7. It is, amply, clear from the testimony that she was allured and attracted by the accused Dilip whose residence is in the same locality, by calling her to fetch water from his house as there was shortage of water at that time. Therefore, minor Bharti along with water pot went to the house of the accused Dilip and at that time, the wife of the accused was not present as she had gone to visit her parents and taking advantage of this situation, the accused closed the doors and repeatedly committed rape on minor Bharti. She has, elaborately, narrated what transpired during, unfortunate, period in the house of the accused and what was done by the accused with her in Paras 3 & 4, of Ex.7.

#. Minor Bharti on going back home informed his sister Usha who, obviously, offered two slaps and on hearing the mother also slapped her. The father of the minor Bharti reached home in the evening at about 8.00 P.M. and thereafter they all went to the police station for lodging complaint. The FIR is produced, at Ex.8. It is also very clear from her testimony that the wife of the accused Dilip and the wife of the brother of the victim Bharti are the real sisters, so there was tie of social relationship.

#. The prosecution witness No.2 Dr.Hinaben R. Patel examined at Ex.9, has also, fully, corroborated the case

of the minor prosecutrix. It becomes clear from her evidence that upon the extensive physical examination of minor Bharti, Dr. Patel found that hymen of Bharti to be torn and there were blood marks. She had also collected sample of swab for the purpose of examination. It is, also, very clear from the testimony that in case of rape upon minor prosecutrix like Bharti, it was possible that the marks and the tinge of the blood on the torn hymen were possible. Upon the ossification and radiological test, Dr. Satish Dinkarbhai Kalele prosecution witness No.6, examined, at Ex.18, found that minor Bharti was found of age of 13 years with margin of error 6 months on either side at the relevant time. It, therefore, becomes crystal clear from the testimony of minor victim Bharti that accused raped her which is also corroborated by evidence of Dr. Patel. The evidence of the prosecutrix minor Bharti is, fully, supported by her mother Shardaben Mansukhlal, prosecution witness No.3, at Ex.13. Thus, the story which had happened or a ghastly crime committed by the accused in his house was, immediately, reported to the mother and sister by minor Bharti.

#. Prosecution Witness No.6 Dr.S. D. Kalele at Ex.18 had examined victim and the violator of law accused and upon ossification and radiological test, he found age of the minor around 13 years with margin of 6 months error either side as stated hereinabove. He also examined accused and there were no marks on the private part of the accused. It is, clearly, testified by Dr. Kalele that when adult person commits act of rape upon the minor girl like victim Bharti and in case of no quarrel between them, there may not be marks of injuries and there may not be tearing of cloths.

#. Prosecution witness No.7 Nathesingh Pujesingh Rathod of Jamnagar (City) Division Police who was PSI at the relevant time conducted the investigation and upon completion of the investigation chargesheeted the accused for the offences punishable under Section 376 and 342 and accordingly charge was framed in aforesaid sessions case and the trial court found that appellant accused guilty as stated hereinabove.

##. After having considered the factual scenario emerging from the record of the present case, we have no hesitation in finding that all the material ingredients attracting the rigorous of the offences under the provisions of Section 375 and 376 are, fully, satisfied and established. Section 375 defines what is rape and Section 376 prescribes the punishment for rape. In the light of the evidence on record, we are satisfied that an

accused appellant in this appeal is guilty for the offences of rape committed not for once but for more than once on minor Bharti, victim of sexual offences.

##. The evidence of prosecutrix minor baby Bharti is found quite trustworthy and reliable. Her testimony also remained unimpeachable. The conviction can be founded even upon the testimony of the prosecutrix, if her evidence is found quite trustworthy and reliable. Whereas in the present case, her testimony is fully reinforced by medical evidence, the complaint Ex.8 and the reliable evidence of mother Sharda.

##. The next point for our consideration is the question of the sentencing. We do not agree with the learned Advocate Mr.Bhuddhabhatti that the offence committed by the accused would fall under Section 376 read with Section 511. Since the repeated acts of rape are, succinctly, established by the prosecution, it is the case of offence punishable under Section 376 of IPC. The trial court has, rightly, convicted the accused for the offence punishable under Section 342 also. Section 342 provides the punishment for wrongful confinement. The case of offence punishable under Section 342 defines that whoever, wrongfully, restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribed limit, is said "wrongfully to confine" that person. In short the essential ingredients of this offence of Section 342 of IPC is wrongful confinement by an accused to the complainant or the victim which is also very much established by the prosecution. Therefore, the conviction by trial court of the accused in the impugned judgment under Section 376 and 342 is, fully, justified and we confirm it.

##. In so far as the quantum of sentence is concerned, we have considered the facts and circumstances of the case, which were enumerated in details by the accused before the trial court. Learned advocate Mr.Bhuddhabhatti for the appellant desperately contended that the punishment of rigorous imprisonment of 10 years for the offence punishable under Section 376 is harsh and excessive in view of the personal factors of the accused. The learned Additional Public Prosecutor has also highlighted counter aspects, and has contended that this is not the fit case for reduction of sentence.

##. It may be mentioned at this stage that after having considered the gravity and the character of the offences and the age of the minor, who was found to be 13 years at the relevant time, whereas, accused was 32 years

old and married with two children, We are of the opinion that there is no case for reducing the sentence. It is again true that, so far as, decision making process of sentencing is concerned, it is not the crime only but the criminal, a person who has committed crime - the accused, and the aspects referable to him are also required to be borne in mind. Following aspects must weigh with the court :

- (1) Minor baby prosecutrix Bharti was about 13 years old at the relevant time,
- (2) She was attracted to come to the house of the accused at the time, his wife had gone to her parent's house, to fetch the water,
- (3) Since there was shortage of water out of the municipal water supply- taps and it was necessary to fetch the water, the minor was tempted to go to the house of the accused with a pot.
- (4) After closing the doors of his house, the accused repeatedly committed acts of rape on minor Bharti aged 13 years and satisfied his lust.
- (5) The offence of rape is serious offence and the victim of the sexual offence is minor. That the rapist not only violates the victim's personal, physical integrity but shatters the psychological frame.

##. Accordingly the prosecutrix aged 13 years who became the victim of the lust of the accused aged 32 years, married and having two children must have undergone serious traumatic experience. She had undergone and felt terribly embarrassed and agony on account of the incident.

##. We are also reminded of the pertinent observations made by the Hon'ble Apex Court in State of Punjab Vs. Gurmat Singh 1996(2) S.C.C 1393 in connection with the offences punishable under Section 376 of IPC, wherein, it is, seriously, observed that a murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature.

##. The learned advocate Mr. Bhddhabhatti has also placed reliance on a judgment of the Division Bench of this court rendered in Mohanlal Amraji Marwadi V. State of Gujarat, 37 G.L.H.(2) 1996 - 200. After having gone through entire decision, we find that the said decision is not of any avail to the appellant - original accused. On the contrary the observations made by the Court in Para-9 run opposite to the submission propounded before us. It has been, clearly, observed by this court in Para-9.1, that merely because the medical evidence is not found supporting that by itself in a given case may not be sufficient to throw away the entire testimony of the prosecutrix overboard outright. Ultimately, if the prosecutrix is found to be dependable and of sterling quality, then even in absence of the medical evidence, in a given case, the Court can convict the accused. The reason is that medical evidence is, ultimately, merely a corroborative piece of evidence. It is, altogether, a different thing that by way of ordinary prudence the Court may insist upon the medical evidence to convict the accused but then there is no law or hard and fast rule that in order to record the order of conviction and sentence, the medical evidence is, necessarily, and invariably must and first, and it must further invariably corroborate the say of the victim girl and then and then only the evidence of victim girl could be accepted. In fact, as stated above, the only and the basic test for the Court is to find out whether the victim girl is wholly dependable. If it satisfies the conscience of the Court that she is 100 % dependable then the accused can be convicted even in the absence of medical evidence.

##. Mr. Bhuddhbhatti, learned advocate for the appellant - accused has also placed reliance on decision of Division Bench of this Court in 37(2) G.L.R. - 821. The accused charged with Section 376 came to be acquitted in view of the discrepancies in evidence and the delay in lodging the FIR. It will be also interesting to note that even with regard to the physical condition of the minor, it was found by this court that hymen was intact and there were no injuries on the male organ. The case came to be decided on the merits of the facts proved on record, whereas the factual scenario emerging of the present case is altogether different. The prosecutrix's evidence is found fully dependable and reliable. Her evidence is corroborated and supported by the medical evidence and lodging of complaint at the earliest point of time therefore the proposition which is based on the facts of the case could not be of any help to the appellant in this case as the facts, are altogether different.

##. Thirdly the reliance is placed on case law rendered in Dudhiya Chhaganlal Vaghri Vs. State of Gujarat, 1991 (2) GLH - 263. This decision is relied on presumably in support of the contention that the sentence may be reduced. In that in Paras 2 & 9, the circumstances affecting the formation or decision making of sentence are enumerated and considering those specific circumstances and peculiar facts ostensible in that case, the sentence came to be reduced from 7 years to 2 years. So is not the factual position in the present case. We have, already, indicated and referred to observations made by the Hon'ble Apex Court in State of Maharashtra Vs. Rajendara Gandhi, 1998 S.C.C.(Cri.) - 76. We therefore, find without any hesitation from the aforesaid three decisions relied upon by the learned Advocate Mr.Bhuddhbhatti for the appellant-accused would not be able to make any capital out of them.

##. In short, while summing up in a nutshell, it can safely be said that the manner and mode in which the accused has exploited the minor baby Bharti by calling her under the guise of fetching the water and committing the repeated acts of rape by accused who was aged 32 years and father of two children would steal the heart of law and would not permit us to reduce the sentence rightly imposed by the trial court considering the over all prosecution case and proof thereupon. In the circumstances, we are, extremely, unable to uphold the second contention of learned advocate Mr.Bhuddhbhatti to reduce the sentence in so far as the offence punishable under Section 376 is concerned. With the result this appeal merits rejection. Accordingly while confirming the impugned judgment and order convicting accused for offences punishable under Sections 376 and 342, we, dismiss the appeal.

Date : 30-7-1998 *****

(KPP)